No. 84-140

In the Supreme Court of the United States

OCTOBER TERM, 1984

THOMAS WENDELL HOLLIDAY, PETITIONER
v.
SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

DANIEL L. GOELZER
General Counsel

PAUL GONSON
Solicitor

JACOB H. STILLMAN
Associate General Counsel

ROBERT MILLS
Special Counsel

APRIL MCGUIGAN
Attorney
Securities and Exchange Commission
Washington, D.C. 20549

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QUESTIONS PRESENTED

1. Whether an appeal by the government is timely within the provisions of Rule 4(a)(3) of the Federal Rules of Appellate Procedure, where the government's notice of appeal is filed within fourteen days after a notice of appeal was filed by an adverse party.

2. Whether a defendant in a government enforcement action who does not himself appeal may attack the judgment below with a view to enlarging his own rights and reducing those of the government by challenging the district court's conclusion that he had violated the law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A45-A52) is reported at 729 F.2d 413. The opinion of the district court (Pet. App. A1-A36) is reported at 543 F. Supp. 1292.

JURISDICTION

The judgment of the court of appeals (Pet. App. A53-A54) was entered on March 8, 1984. A petition for rehearing was denied on April 27, 1984 (Pet. App. A55-A56). The petition for a writ of certiorari was filed on July 26, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Securities and Exchange Commission instituted this action against petitioner Thomas Wendell Holliday and Richard A. Chepul, two former officers of Hamilton

Bancshares, Inc. (HBI), to obtain a declaration that they violated, and to enjoin them from committing further violations of, the Securities Act of 1933, 15 U.S.C. 77a *et seq.*, and the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.* (Pet. App. A1-A2, A4-A5; C.A. App. 23).[1] The Commission alleged that, in HBI's required filings, the defendants had concealed from HBI's shareholders and the investing public material information concerning HBI's deteriorating financial condition during the period preceding its bankruptcy (Pet. App. A7; C.A. App. 15-23).

Following an eight-day trial, the United States District Court for the Eastern District of Tennessee found that both defendants had been "primary participants" in "numerous" violations of antifraud,[2] reporting,[3] and proxy[4] provisions of the federal securities laws and that both had acted with reckless disregard for the consequences of their actions despite the "obvious" requirements of the securities laws and the need to provide shareholders with accurate information concerning the financial condition of HBI (Pet. App. A22-A27, A31, A33-A34).[5] The court entered an

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[1]Petitioner was the executive vice president and later president of HBI as well as a member of its board of directors (Pet. App. A4). Chepul was the company's vice president, secretary-treasury and chief financial officer (*id.* at A5). Chepul was supervised by petitioner, and together they were responsible for preparing, reviewing and filing HBI's reports required under the Securities Exchange Act (Pet. App. A4-A6).

[2]Section 17(a) of the Securities Act, 15 U.S.C. 77q(a), and Section 10(b) of the Securities Exchange Act, 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5, thereunder.

[3]Section 13(a) of the Securities Exchange Act, 15 U.S.C. 78m(a), and Rules 12b-20, 13a-1, 13a-11 and 13a-13, 17 C.F.R. 240.12b-20, 240.13a-1, 240.13a-11, and 240.13a-13, thereunder.

[4]Section 14(a) of the Securities Exchange Act, 15 U.S.C. 78n(a), and Rule 14a-9, 17 C.F.R. 240.14a-9, thereunder.

[5]The court noted (Pet. App. A7) that the failure of HBI's largest subsidiary, Hamilton National Bank, was the "third largest bank failure in the history of the Nation" up to that time.

injunction against Chepul but declined to enjoin petitioner solely because, at the time of trial, petitioner was employed by a firm that did not file reports under the securities laws (*id.* at A34-A35; see *id.* at A5). An amended final judgment enjoining Chepul and dismissing the action against petitioner was entered on November 22, 1982 (*id.* at A37).

2. On January 17, 1983 — four days before the expiration of the 60-day period prescribed by Rule 4(a)(1), Fed. R. App. P. — Chepul filed a timely notice of appeal from the amended final judgment (Pet. 4). Seven days later, on January 24, 1983, the Commission also filed a notice of appeal from the amended final judgment (Pet. App. A41). Chepul subsequently settled with the Commission and his appeal was dismissed by stipulation (Pet. 5).

Petitioner moved to dismiss the Commission's appeal. He contended that since the Commission's notice of appeal had not been filed within 60 days after entry of the amended final judgment, it was not timely under Rule 4(a)(1). The court of appeals denied petitioner's motion (Pet. App. A43-A44), concluding that the Commission's notice was timely because it had been filed within 14 days after Chepul's notice, as provided by Rule 4(a)(3).[6]

In its opening brief on the merits, the Commission argued that the district court had erred in declining to enjoin petitioner solely because of his change of employment. In response, petitioner argued that the district court had correctly denied injunctive relief. The principal thrust of his brief, however, was that the district court had erred in

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[6]Rule 4(a)(3), Fed. R. App. P., provides:

> If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

finding that petitioner had violated the federal securities laws, and he sought to have that aspect of the district court's decision reversed.

In light of petitioner's failure to file a notice of appeal, the court of appeals declined to consider his challenge to the district court's finding of violation (Pet. App. A47). The court stated that a notice of appeal is jurisdictional "where an appellee wishes to attack part of a final judgment in order to enlarge his rights or to reduce those of his adversary" (*id.* at A47-A48). In addition, the court of appeals reversed the district court's denial of an injunction against petitioner, concluding that the district court had erred in treating petitioner's change of occupation as controlling the question of injunctive relief (*id.* at A53-A54). The case was remanded with instructions for the district court to enter an appropriate injunction against petitioner (*id.* at A52, A54).

ARGUMENT

The judgment of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review by this Court is therefore unwarranted.

1. The court of appeals correctly held that the Commission's notice of appeal was timely within the provisions of Rule 4(a)(3), Fed. R. App. P. Although the Commission's notice was filed more than 60 days after the entry of judgment by the district court, it was timely nevertheless because it was filed within 14 days after a notice of appeal was filed by Chepul, petitioner's co-defendant. Petitioner claims (Pet. 12-14), however, that because he was not "a party to the portion of the Amended Final Judgment" from which Chepul had appealed, therefore the Commission could not take advantage of the 14-day period. The contention is without merit.

Rule 4(a)(3) has no such limitation. It provides that "[i]f a timely notice of appeal is filed *by a party, any other party*" (emphasis added) may have an additional 14 days in which to file a notice of appeal. The notes of the committee that recommended the adoption of the 1966 amendment allowing the additional 14 day period state (9 Moore, Ward & Lucas, *Moore's, Federal Practice* para. 203.25[3], at 3-106 (2d ed. 1983); emphasis added)[6] that it

> affords additional time for appeal to *all parties* other than an initial appellant * * *. The added time which may be made available by the operation of the provision is not restricted to cross appeals in the technical sense, i.e., to appeals by parties made appellees by the nature of the initial appeal. The exception permits *any party to the action* who is entitled to appeal within the time ordinarily prescribed to appeal within such added time as the sentence affords.

The Commission, petitioner and Chepul were all parties to the same civil case;[7] and, thus, by the clear terms of Rule 4(a)(3), the Commission was entitled to appeal from the judgment within the 14 day period following the filing of Chepul's notice of appeal.

Petitioner has cited no authority for limiting the rule as he suggests. *Kurdziel* v. *Pittsburgh Tube Co.*, 416 F.2d 882

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[6]The fourteen-day grace period was added in 1966 to Rule 73(a) of the Federal Rules of Civil Procedure. Rule 4(a) of the Federal Rules of Appellate Procedure, which became effective on July 1, 1968, was derived from that rule without any change of substance. The committee notes to the former rule continue to be a useful guide to Rule 4(a), providing a detailed explanation of the reasons for and effect of various of the provisions of Rule 4(a). See Fed. R. App. P. 4 advisory committee note; 9 Moore, Ward & Lucas, *supra*, para. 201.08[3], at 1-23.

[7]In the context of Rule 4(a), it is clear that "party" refers to a party to a "civil case" (see Rule 4(a)(1)), rather than to a party to a judgment or portion of a judgment.

(6th Cir. 1969), on which he relies (Pet. 11-12), states " 'that the purpose of the rule * * * was clearly to give subsidiary parties, such as third-party defendant[s] * * * an opportunity to know whether or not an appeal was going to be taken in the principal case before they were required to make their judgment as to whether or not to appeal,' " but *Kurdziel* does not limit the application of the rule to such "subsidiary" parties. 416 F.2d at 885. Indeed, the opinion quotes the committee notes that explicitly state that the rule permits " 'any party to the action' " to appeal within the added time. 416 F.2d at 884-885.[8]

2. With respect to the court of appeals' refusal to consider petitioner's challenge to the district court's determination that he violated the securities laws, the issue presented in the petition is a narrow one. Petitioner does not dispute the "inveterate and certain" rule of *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U.S. 185, 191 (1937), that an appellee who does not himself appeal may not

> attack the decree [of the district court] with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.[9]

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[8]The court of appeals' holding provides the same meaning to the term "any other party" in Rule 4(a)(3) as the terms "any party" and "all parties" convey in Rule 4(a)(4), Fed. R. App. P. Rule 4(a)(4) states that the filing "by any party" of certain specified motions in the district court tolls the time for appeal "for all parties" until the motion is decided. See 9 Moore, Ward & Lucas, *supra*, para. 203.25[3], at 3-107. It is of no consequence that the post-judgment motion was directed against only certain parties; it has "the effect of terminating the running of the time for appeal against all the [parties]." *Polara* v. *Trans World Airlines, Inc.*, 284 F.2d 34, 36 (2d Cir. 1960).

[9]This rule has been applied in numerous cases by this Court and the courts of appeals. *E.g., United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 226 n.2 (1975) (review by Supreme Court in absence of

Indeed, petitioner appears to concede that he could not "attempt to increase his right under the judgment or decrease the SEC's right" (Pet. 16). He argues instead that a reversal of the district court's conclusion that he violated the securities laws would not have enlarged his rights. So viewed, petitioner's submission does not call for this Court's intervention since he is merely quarrelling with the court of appeals' application of a universally accepted legal principle to the facts of this case.

In any event, the decision of the court of appeals was correct, since petitioner was plainly seeking to enlarge his rights and reduce those of the government. A finding in a government enforcement action that a defendant violated the law has significance independent of the ultimate decision to deny injunctive relief. Indeed, this Court has held that the government is entitled to a finding on the issue of a violation even though injunctive relief is denied. *United States* v. *Parke, Davis & Co.*, 365 U.S. 125, 126 (1961).[10] The instant case well illustrates the importance of that holding. The district court here refused to enjoin petitioner solely because it concluded that his present employment makes it unlikely that he will be in a position to violate the securities laws. Even if the Commission had not prevailed on appeal, it could still return to the district court in the future and request that the judgment be amended and petitioner enjoined should he change his employment once

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cross-petition for a writ of certiorari); *Strunk* v. *United States*, 412 U.S. 434, 437 (1973); *NLRB* v. *International Van Lines*, 409 U.S. 48, 52 n.4 (1972); *Penfield Co.* v. *SEC*, 330 U.S. 585, 594 (1947); *LeTulle* v. *Scofield*, 308 U.S. 415, 421-422 (1940); *United States* v. *American Ry. Express Co.*, 265 U.S. 425, 435-436 (1924); *SEC* v. *Fifth Avenue Coach Lines, Inc.*, 435 F.2d 510, 516 (2d Cir. 1970).

[10]As in *Parke, Davis*, the complaint in this case specifically requested, in the prayer for relief, a declaration that the defendants had violated the law (C.A. App. 23).

again. That possibility for relief would not have been open to the Commission had the court of appeals reversed the district court's finding of violation.

In addition, if petitioner should violate the securities laws in the future, the fact that the district court found violations in this case — regardless of whether the court of appeals had ordered an injunction — would be an important factor demonstrating the need for injunctive relief in any action brought by the Commission to redress such future violations.[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

DANIEL L. GOELZER
General Counsel

PAUL GONSON
Solicitor

JACOB H. STILLMAN
Associate General Counsel

ROBERT MILLS
Special Counsel

APRIL MCGUIGAN
Attorney
Securities and Exchange Commission

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[11]We also note that findings of violation in Commission enforcement actions may have collateral estoppel effect in private actions brought under the securities laws. *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 332-333 (1979).

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